UTAH SUPREME COURT
ADVISORY COMMITTEE ON THE
RULES OF PROFESSIONAL CONDUCT

REPORT ON THE DEFINITION OF "THE PRACTICE OF LAW"

August 18, 2003

The Court's Charge.

Pursuant to a request from the Utah Supreme Court, the Utah Supreme Court Advisory Committee on the Rules of Professional Conduct has undertaken to provide the Court with a recommendation for a careful definition of the "practice of law," to be adopted by the Court in connection with its role in overseeing the practice of law in Utah.

Background.

Previous Supreme Court Action. In 1995 the Utah Supreme Court gave a characterization of the practice of law in *Utah State Bar v. Summerhayes & Hayden*:[1]

> The practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent. It not only consists of performing services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities. It also includes the preparation of contracts and other legal instruments by which legal rights and duties are fixed.

Although this gives a reasonably intuitive notion of what is typically involved in the practice of law, it is, strictly speaking, not a definition. It does touch on three important ingredients: (a) serving the *interests of another*, (b) *counseling, advising, and assisting* such persons, (c) and doing so in connection with their legal *rights, duties, and liabilities*. Still, it is circular because it uses the term "legal principles" as a key element without defining it. To be on logically firmer ground, the definition of the "practice of law" must involve—in some way—a definition of "law" (or "legal principles"). More on this below.

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[1] 905 P.2d 867, 869-70 (Utah 1995) (citations omitted).

Two years later, in addressing the jurisdictional distinction between authorized and unauthorized practice of law, the Court stated in *Board of Commissioners of Utah State Bar v. Petersen* that "The regulatory authority granted the Utah Supreme Court in article VIII, section 4 [of the Utah Constitution] clearly refers to the *authorized* practice of law, not to the unauthorized practice of law."[2] This divided the "practice of law" into a piece that the Court asserted jurisdiction over (authorized practice) and a piece over which it claimed not to have jurisdiction (unauthorized practice).

In an action that appears to have modified its treatment of the jurisdictional issue in *Peterson*, the Court added subsection (a) to Rule 6 of the Utah Rules of Lawyer Discipline and Disability:

> *Persons practicing law.* The persons subject to the disciplinary jurisdiction of the Supreme Court and the OPC [Office of Professional Conduct] include any lawyer admitted to practice law in this state, any lawyer admitted but currently not properly licensed to practice in this state, any formerly admitted lawyer with respect to acts committed while admitted to practice in this state or with respect to acts subsequent thereto which amount to the practice of law or constitute a violation of any rule promulgated, adopted, or approved by the Supreme Court or any other disciplinary authority where the attorney was licensed to practice or was practicing law at the time of the alleged violation, any lawyer specially admitted by a court of this state for a particular proceeding, and *any other person not admitted in this state who practices law or who renders or offers to render any legal services in this state*.[3]

This appears to be a recognition that article VIII, section 4 of the Utah Constitution gives the Supreme Court jurisdiction over *all* practice of law, no matter who is engaged in it. Thus, the Court's Rule 6(a) inherently recognizes there are persons who "practice law" and who may not be lawyers or otherwise authorized to do so.

In this context, the Court has asked the Advisory Committee to provide a structure on which to base the distinction between authorized and unauthorized practice of law. The former may contain areas in which nonlawyers would be authorized; the latter may contain "lawyers" who are nevertheless not authorized. Then, by definition, any individual who is not so authorized is engaged in the unauthorized practice of law.

The ABA Definition. After considerable effort, a committee of the American Bar

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[2]937 P.2d 1263, 1270 (Utah 1997).

[3]Judicial Council Rules of Judicial Administration, ch. 14, Rule 6(a) (2003) (emphasis added), http://www.utcourts.gov/resources/rules/ucja/index.htm

Association recently developed a definition of the practice of law.[4] However, the ABA House of Delegates did not adopt the proposed definition, suggesting that the states develop their own individual definitions.[5] The ABA's attempt to define "practice of law" had the defect discussed above: It was basically circular because it defined practice in terms of "legal principles" and "person[s] trained in the law." It had the further drawback of providing that *only* lawyers can practice law—although it finally noted the exceptions to this in the last section of the definition.

For the reasons explained above, this is a more complicated and more nebulous way to define the practice of law because it runs together the *acts* and *legal areas* with the identification of those who are authorized to engage in the practice.

One of the major difficulties with this approach is that it does not account at the outset for the wide range of activities which, when performed by a lawyer, are regarded as the practice of law,[6] yet, when engaged in by nonlawyers, these acts are not considered the unauthorized practice of law. Examples abound: real estate transactions, various insurance-related activities, mediation services, certain representation of companies in small claims courts, and many others.

The ABA has long recognized one side of this overlap by adopting a specific rule to address lawyers' responsibilities when practicing in these areas. ABA Model Rule 5.7, "Responsibilities Regarding Law-Related Services," deals with "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." Put another way, Rule 5.7 holds that lawyers engaged in "law-related services" carry the full responsibilities of adherence to the Rules of Professional Conduct, even though they would not be so bound if they were not members of the Utah State Bar.[7]

Adoption of the ABA "definition" could make an unnecessary tangle out of the interface with the areas that are part of the "non-practice of law" that is ordinarily thought of as the application of legal principles to the facts and circumstances of another person. We—as did the ABA House of Delegates—have declined to adopt the ABA

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[4]See Attachment B.

[5]U.S. LAW WEEK, April 15, 2003, at 2643.

[6]At least, they subject the lawyer to the constraints imposed on the practice of lawyers by the Court's rules.

[7]Utah did not adopt Model Rule 5.7, although it is under consideration in connection with the current evaluation of the ABA's Ethics 2000 Model Rules. However, there are several Utah ethics opinions to the same effect. *See, e.g.,* Ethics Adv. Op. 02-04, www.utahbar.org/opinions/-html/02-04.html (Utah St. Bar 2002).

committee's draft definition.

Other States' Approaches. The Committee has surveyed many of the attempts by the various state bars to deal with the task of defining the practice of law. Almost all of the results suffer some form of the same shortcoming: They are inherently circular or shift the problem to rely on other undefined terms. Others attempt to circumscribe the area of practice by giving examples. Many are clearly out of date, having been adopted at a time when the current public-policy issues in this area had not yet arisen, and many are closely related to the "practice of law is what lawyers do" style.

The Washington State Bar Association's structural treatment of the issue perhaps comes the closest to what the Committee is proposing here.[8] It purports to define what the practice is in general terms and then lists exceptions that would not be construed as unauthorized practice. Nevertheless, its basic definition refers to persons "trained in the law" with no definition of the phrase, and it attempts to flesh out the definition with examples of the practice.

Having considered the ABA's and other states' definitions and found them to have a variety of shortcomings, the Committee concluded that it would best serve the Court to start with basic analytic principles and construct a definition "from the ground up."

Fundamental Considerations.

A careful, axiomatic approach to defining the "practice of law" should start with a fully understood idea of what constitutes "the law." Otherwise, one will likely produce a circular definition that may advance the solution of the problem very little. Similarly, beginning the definitional process by referring to "legal principles" without defining the term is just as far from providing a useful definition of the practice of law.

Once it is understood what body of human knowledge and information constitutes "the law," defining the "practice of law" will involve the characterization of the *actions and situations* that are to be considered the "practice," without reference to the qualifications of those who might be engaged in that practice. That is, one of the most important concepts in approaching the definition in this way is that the definition of the "practice of law" should be independent of the training, background, titles or qualifications of a person who might be engaged in the practice. This avoids the unworkable approach of defining the practice of law as "what lawyers do."

Once a definition of "the law" and the actions and situations that make up its "practice" are established, the last element is to decide where lawyers and nonlawyers fit

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[8]See Attachment C.

into the picture and where the dividing line between authorized practice of law and unauthorized practice should be drawn.[9]

An intermediate step is to specify those persons who will be denominated "lawyers" and will be eligible to engage in all forms of the practice of law. The Court has developed, as administered by the Utah State Bar, a comprehensive set of qualifications that a person must demonstrate to become a Utah lawyer. Thus, we take the definition of "lawyer" as a given; we think it is not an element of the Court's charge to the Advisory Committee.[10]

Once the "practice of law" and "lawyer" have been defined, the last element is the independent task of deciding what subsets of the practice of law may be engaged in by nonlawyers. This is perhaps the most daunting part of the problem, but structuring the overall task in this way allows the "practice of law" to be a fixed, largely immutable concept, while the specification of various subsets of practice that may be open to nonlawyers may change from time to time to reflect society's ever-changing view of this landscape, without the necessity of tinkering with the basic definition of the practice of law.

Definition of the Practice of Law.

The Law and Legal Principles. Having concluded that a sound definition of the practice of law should not rely on the use of such undefined terms as "legal principles" and "the law," we undertake to define the extent of the "law" as the term is used in the "practice of law." To that end, because "the law" consists generally of the "do's" and "do not's" of society set forth by legislatures and other governmental law-making bodies and complemented by the interpretation and application of these declarations by a variety of tribunals, we propose the following definition:

> The "law" is the collective body of declarations by governmental authorities that establish a person's rights, duties, constraints and freedoms and consists primarily of:
>
> (i) constitutional provisions, treaties, statutes,[11] ordinances, rules, regulations and similarly enacted declarations; and

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[9]In broad terms, the first part of the exercise—to give a formal definition of the "practice of law"—is a jurisprudential task, while the process of determining what areas of the law nonlawyers may legally be involved in is largely a public-policy matter.

[10]The term "lawyer" will be used throughout. There is no intent to distinguish it from "attorney," as those terms are usually used interchangeably.

[11]Laws effected by initiative and referendum would be included as declarations of a "governmental authority"—namely, the people.

(ii) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person's rights, duties, constraints and freedoms.

"Person" includes the plural as well as the singular and legal entities as well as natural persons.

This captures (a) the governing frameworks that are characterized by constitutions, legal codes, ordinances, regulations and the like—roughly speaking, affirmative statements and actions by government bodies of what behavior is and is not permitted in society, and (b) the "common law" or interpretational law that issues from judicial and quasi-judicial institutions—primarily the courts and administrative agencies.[12]

Practice of Law. No matter how restrictive or expansive society decides to define the universe of persons who are permitted to "practice law," it is essential first to decide what *activities* constitute the practice—not the persons who might do it.

The general idea—even among lay persons—is that the practice of law involves two basic elements: (a) *application of the law* to particular facts and circumstances, and (b) the *representation*[13] *of the interests of another person.*

The "application of the law" element, by itself, would not constitute the practice of law under any normal jurisprudential scheme. Legal scholars, for example, engage in this activity as a profession, but they are not considered "practicing" lawyers as long as they are not representing a person.[14] Similarly, *pro se* representation may involve application of legal principles to one's own situation, but would not involve representation of another.

On the other hand, the representation of a person as an agent does not necessarily involve the application of legal principles and does not, in and of itself, constitute the

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[12]One of the more obvious problems in the 2003 Legislature's enactment of § 78-9-101 is the failure to recognize the panoply of administrative agencies in which persons' rights and obligations are decided on a regular basis. This is no less a sphere for rendering important legal judgments than is the judiciary.

[13]"Representation" here is not limited to advocacy representation. It is meant in the broader sense of rendering advice about rights and obligations to a person, including service in an advocacy role when appropriate.

[14]Indeed, many legal scholars are not admitted to practice law in the jurisdictions where they conduct their profession of "applying legal principles."

practice of law.[15]

In connection with the definition of "the law" above, the practice of law can now be defined as follows:

> The "practice of law" is the representation of the interests of another person by informing, counseling, advising, assisting or advocating for that person through application of the law and associated legal principles to that person's facts and circumstances.

Unauthorized Practice of Law.

Having defined the practice of law broadly and making it the universe in which any Utah lawyer[16] may practice,[17] we then recognize today's society demands (and reasonably so) that a number of areas of the practice of law may be undertaken by persons who are not lawyers.

This tends to be a two-dimensional problem for any given area: (a) First, one specifies an area in which it is not necessary to be a Utah lawyer to engage in the particular practice. (b) Then, it may be necessary to specify what, if any, qualifications short of being a Utah lawyer enable the person to engage in such practice.[18]

The final section of the proposal identifies situations and areas of legal practice that the Court may wish to specify as being open to certain nonlawyers. For example, the Washington State Bar Association has adopted a definition that takes this approach, defining "practice" broadly and then granting "permission" to nonlawyers to function in a variety of areas, such as in mediation, professional licensure in specific disciplines and lobbying. Although a list of this type may seem lengthy and a little unwieldy, it is inherently responsive to changes in licensure, for example, and can be directly changed from time to time without disturbing the underlying definitional structure. We believe that this is the best way to deal with this issue. It is definitive, rather than exemplary,

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[15]There are many examples: Some activities of real estate agents and escrow agents; voting proxies; a dueler's "second." Even so, some of these border on the application of legal principles, and that is what makes this area difficult to analyze.

[16]"Utah lawyer" is understood to mean one who has "active" status and is in good standing with the Utah State Bar.

[17]Just because a Utah lawyer is *authorized* to practice in any legal area does not mean he satisfies the criterion of competence as set forth, for example, in Utah Rules of Professional Conduct 1.1. This distinguishes *authorized* practice from *competent* practice.

[18]E.g., practice before the U.S. Board of Patents and Trademarks; serving as a mediator or arbitrator under Utah Code Ann. §§ 58-39a-1 *et seq*. (2002).

and it is consistent with the goal of providing a fixed-boundary definition that informs all interested parties what is expected of them.

This approach also seems consistent with the Utah Constitutional framework and the current formulation in Rule 6(a) of the Rules of Lawyer Discipline and Disability.

Authorized Practice of Law for Nonlawyers. In connection with Rule 6(a) of the Rules of Lawyer Discipline and Disability and the definition of practice of law above, we can establish the framework for drawing the line between authorized and unauthorized practice of law. This approach provides a formulaic method to clarify that several "law-related activities," as that term is defined in the ABA Model Rules,[19] are not considered to be the unauthorized practice of law. It also allows the addition, modification or removal of various activities from the universe of unauthorized practice as the political, social and economic climates may change.

Typical examples are assisting others with various court forms; representing one's minor child; representing an entity before an administrative agency that allows lay representatives; serving in various alternative dispute resolution roles; consulting in foreign law; and lobbying.

Final Recommendation.

The result of this definitional construction and the delineation of legally related acts that would not be considered the unauthorized practice of law are set forth in Attachment A as proposed new Rule 6.1 of the Utah Supreme Court Rules of Lawyer Discipline and Disability in Chapter 14 of the Utah Code of Judicial Administration.

Although the Rules of Lawyer Discipline and Disability do not otherwise include official comments (or unofficial commentary, for that matter), we believe that a comment section, similar to the "official" comments that accompany the Utah Rules of Professional Conduct, is warranted. Accordingly, we have provided a skeletal version of comments that we believe should be a part of Proposed Rule 6.1 to give some examples and elaboration on some of the concepts in the black-letter rule.

In summary, the Committee's recommendation comprises three components: (a) a careful definition of the fields of information and knowledge that make up "the law," (b) a definition of what it means to "practice" in these fields, and (c) a delineation of those activities that may be included in the practice of law, but which may be engaged in by nonlawyers without being considered the unauthorized practice of law.

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[19]ABA Model Rules of Professional Conduct 5.7. See note 7, *supra.*

ATTACHMENT A

RULES OF LAWYER DISCIPLINE AND DISABILITY
CHAPTER 14 OF THE CODE OF JUDICIAL ADMINISTRATION.

RULE 6.1 [Proposed]

(a) Except as set forth in subsection (c) of this Rule, only persons who are active members in good standing of the Utah State Bar may engage in the practice of law in Utah.

(b) For purposes of this Rule:

(1) The "practice of law" is the representation of the interests of another person by informing, counseling, advising, assisting, or advocating for that person through application of the law and associated legal principles to that person's facts and circumstances.

(2) The "law" is the collective body of declarations by governmental authorities that establish a person's rights, duties, constraints and freedoms and consists primarily of:

(i) constitutional provisions, treaties, statutes, ordinances, rules, regulations and similarly enacted declarations; and

(ii) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person's rights, duties, constraints and freedoms.

(3) "Person" includes the plural as well as the singular and legal entities as well as natural persons.

(c) To the extent that a person not otherwise authorized to practice law in Utah is engaged in any of the following acts, such a person is not engaged in the unauthorized practice of law or subject to discipline under Rule 6(a) when:

(1) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(2) Providing general legal information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies, but not specific advice related to another person's facts or circumstances.

(3) Providing assistance without compensation to another person to complete forms provided by a court for protection from harassment or domestic violence or abuse.

(4) Assisting one's minor child or ward in a juvenile court proceeding, subject to court approval.

(5) Representing without compensation a natural person or representing a legal entity as an employee representative in small claims court, subject to court approval.

(6) Representing without compensation a natural person or representing a legal entity as an employee representative in an arbitration proceeding, where the amount in controversy does not exceed the jurisdictional limit of the small claims court set by the Utah Legislature.

(7) Representing a party in any mediation proceeding.

(8) Acting as a lay representative before administrative tribunals or agencies as authorized by tribunal or agency rule or practice.

(9) Serving in a neutral capacity as a mediator, arbitrator or conciliator, including court facilitator.

(10) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements or as otherwise allowed by law.

(11) Representing persons as permitted by the *pro hac vice* rules adopted by Utah state and federal courts or under any applicable admission rules for persons admitted to practice law in other jurisdictions.

(12) Advising or preparing documents for others by persons whose occupations (i) involve applications of one or more areas of the law and (ii) are regulated or subject to professional oversight by an administrative agency of the State of Utah or by a nationally recognized professional licensing or accreditation organization.

(13) Lobbying governmental bodies as an agent or representative of others.

(14) As otherwise determined by the Utah Supreme Court by rule, order or decision.

Comment:

Subsection (a)

"Active" in this paragraph refers to the formal status of a lawyer, as determined by the Utah State Bar. Among other things, an active lawyer must comply with the Bar's requirements for continuing legal education.

Subsection (b).

The practice of law defined in Subparagraph (b)(1) includes: giving advice or counsel to another person as to that person's legal rights or responsibilities with respect to that person's facts and circumstances; selecting, drafting or completing legal documents that affect the legal rights or responsibilities of another person; representing another person before an adjudicative, legislative or executive body, including the preparation or filing of documents and conducting discovery; negotiating legal rights or responsibilities on behalf of another person.

Because representing oneself does not involve *another* person, it is not technically the "practice of law." Thus, any natural person may represent oneself as an individual in any legal context. To the same effect is Section III.T of the Rules for Integration and Management of the Utah State Bar: "Nothing in this section shall prohibit a person who is unlicensed as an attorney at law or a foreign legal consultant from personally representing that person's own interests in a cause to which the person is a party in his or her own right and not as assignee."

As defined in subparagraph (b)(2), "the law" is a comprehensive term that includes not only the black-letter law set forth in constitutions, treaties, statutes, ordinances, administrative and court rules and regulations, and similar enactments of governmental authorities, but the entire fabric of its development, enforcement, application and interpretation.

Laws duly enacted by the electorate by initiative and referendum under constitutional authority would be included under subparagraph (b)(2)(i).

Subparagraph (b)(2)(ii) is intended to incorporate the breadth of decisional law, as well as

the background, such as committee hearings, floor discussions and other legislative history, that often accompanies the written law of legislatures and other law- and rule-making bodies. Reference to adjudicative bodies in this subparagraph includes courts and similar tribunals, arbitrators, administrative agencies and other bodies that render judgments or opinions involving a person's interests.

Subsection (c).

To the extent not already addressed by the requirement that the practice of law involves the representation of others, subparagraph (c)(2) permits the direct and indirect dissemination of legal information in an educational context, such as legal teaching and lectures.

Subparagraph (c)(3) permits assistance provided by employees of the courts and legal-aid and similar organizations that do not charge for providing these services.

Subparagraph (c)(7) applies only to the procedures directly related to parties' involvement before a third-party mediation neutral; it does not extend to any related judicial proceedings unless otherwise provided for under this rule (*e.g.*, under subparagraph (c)(5)).

Subparagraph (c)(12) is intended to include the advice and document preparation rendered by certified public accountants, alternate dispute resolution practitioners, marriage and family therapists, real estate agents and brokers, securities agents and brokers, estate and financial planners and advisors, and persons engaged in similar law-related occupations that are subject to some form of government regulation or occupational certification or accreditation.